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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 464

STEVEN HAMILTON, MICHAEL SMITH, STEWART ALPERT and JERRY RUBIN,
Petitioners,

vs.

THE MUNICIPAL COURT FOR THE BERKELEY-ALBANY JUDICIAL DISTRICT,
Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, First Appellate District, State of California

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners Steven Hamilton, Michael Smith, Stewart Alpert and Jerry Rubin pray that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeal of the State of California, First Appellate District, Division Three, entered in the above-entitled case on March 20, 1969.

OPINIONS BELOW

The opinion (and dissent with respect thereto) of the Court of Appeal of the State of California (Exhibit A)[1] is reported at 270 A.C.A. 885 (1969). Prior to the opinion and judgment of the Court of Appeal, the Superior Court of the State of California in and for the County of Alameda, entered its judgment which is unreported. (C.T. 42-44.) The denial of petitioners' petition for a hearing in the Supreme Court of California (Exhibit B) is unreported.

JURISDICTION

The opinion and judgment of the Court of Appeal of the State of California was dated and entered on March 20, 1969. A timely Petition for Rehearing was filed in the Court of Appeal on April 4, 1969, but was not ruled upon by said Court and hence deemed denied pursuant to the provisions of Rule 27(e) of the California Rules of Court. A timely Petition for a Hearing by the Supreme Court of the State of California was thereafter filed on April 29, 1969. That petition was denied on May 13, 1969, with Justice Peters voting to grant said Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

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[1]The exhibits appear as an appendix to this Petition. "(C.T. p. .....)" as used in this Petition refers to pages of the Clerk's Transcript from the Superior Court of the State of California which transcript forms part of the record on appeal.

QUESTIONS PRESENTED

1. Whether it is violative of the right of free speech guaranteed by the First and Fourteenth Amendments to the United States Constitution for an individual charged with the commission of a crime to be prohibited by a "pretrial publicity order" issued by the trial Court upon the supposed authority of *Sheppard v. Maxwell,* 384 U.S. 333 (1966), from making any "public statements" concerning his trial "or any issue likely to be involved therein"?

2. Assuming such a "pretrial publicity order" might be constitutionally permissible under some circumstances, whether it is violative of the right of free speech guaranteed by the First and Fourteenth Amendments to the United States Constitution for an individual charged with the commission of a crime to be subjected to such an order without a showing that the order was necessary to prevent a clear and present danger that a fair trial cannot be had, but rather upon a showing merely that matters "likely to be involved" in the criminal trial may entail widespread notoriety and relate to a public controversy?

3. Assuming such a "pretrial publicity order" might be constitutionally permissible under some circumstances, whether it is violative of the rights of free speech and due process guaranteed by the First and Fourteenth Amendments to the United States Constitution for an individual charged with the commission of a crime to be prohibited by such an order which broadly interdicts in a vague and indefinite manner whole categories of communication and speech

which, but for the pendency of the criminal proceedings, would be constitutionally immune from prosecution?

4. Assuming such a "pretrial publicity order" might be constitutionally permissible under some circumstances, whether it is violative of the rights of free speech and due process guaranteed by the First and Fourteenth Amendments to the United States Constitution for such an order to sweep within its prohibition any "public statements" concerning the trial "or any issue likely to be involved therein" by anyone in an entire University Community?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the rights, privileges and immunities guaranteed to individuals under and by virtue of the First and Fourteenth Amendments to the United States Constitution as applied to criminal charges against petitioners for the alleged violation of California Penal Code Section 166(4) which renders the wilful disobedience of a Court order a misdemeanor offense. The texts of these provisions are as follows:

"Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code § 166(4):

"Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:

* * * * * *

"4. Willful disobedience of any process or order lawfully issued by any court;"

STATEMENT OF THE CASE

This controversy involves the first instance in a reported case in which a criminally accused individual has been subjected to contempt proceedings for the violation of a judicially-imposed "pretrial publicity order" supposedly issued in the name of a "fair trial" under a *dictum* of this Court in *Sheppard v. Maxwell, supra.* At base, this Petition raises the fundamental question of whether a state can deprive an individual of his right of free speech by the simple expedient of accusing him of a crime.

1. The Setting for the Pretrial Order.

The instant case arose out of a demonstration on the campus of the University of California at Berkeley in November, 1966, the purpose of which was to protest the presence on the campus of recruiters for the Armed Forces of the United States. The four petitioners were part of a group of ten persons arrested on November 30, 1966 on misdemeanor charges. Following their arraignment before the Municipal Court for the Berkeley-Albany Judicial District on December 16, 1966, one of the judges of said Municipal Court, the Honorable George Brunn, issued the pretrial order (appended hereto as Exhibit C) the constitutionality of which is here drawn in issue. On January 13, 1967, the four petitioners violated that order, or so we assume, by issuing a written statement to the press. (Appended hereto as Exhibit D.) On the same date Judge Brunn charged petitioners with a misdemeanor violation of California Penal Code § 166(4) for "wilful disobedience" of the pretrial order. Three days later, January 16, 1967, petitioners were tried before a jury on the original charges, were convicted and were sentenced. While the appeal from the original misdemeanor charges was pending, petitioners obtained new counsel on the Section 166(4) contempt charges and these proceedings ensued.

The legal charges described above arose in the context of a wide-ranging public controversy in which petitioners conceived of themselves as protestants against unlawful restraints upon student political activities at Berkeley. Each petitioner is a former university student who, because of his continuing con-

nection with university affairs, is characterized as a "nonstudent". Both as students and nonstudents, each has played a leadership role in such campus-centered political activities as Vietnam Day and Black Power Day. (C.T. 25-26.) Their participation in the anti-recruiting demonstration of November 30, 1966, was a part of this political activity.

The events of November 30, 1966, including the arrest of petitioners, prompted a "student strike" which swept the Berkeley campus during the pre-Christmas season.[2] The "sit-in," petitioners' arrest and arraignment, and the ensuing "student strike" received enormous publicity in the press—mostly condemnatory in character. On December 2, 1966, the *Berkeley Daily Gazette* editorialized that "if the provocateurs must be arrested twice a day and hauled off to Santa Rita, then that is what should be done. The nonstudent radicals must be stopped and stopped now. They must not be allowed to continue to mislead and agitate the campus." (Item B, *Gazette* clippings.) The same editorial also charged that petitioners were part of a long range, carefully planned program of the "radical left" to disrupt the Univer-

[2]The record on appeal in the California courts consists only of a Clerk's Transcript. No evidence was received in the trial Court other than that contained in the pleadings, the factual allegations of which were uncontroverted. Inasmuch as the trial Court's order was issued in the context of a broad public controversy which had received widespread press coverage, petitioners lodged with the Clerk of the Court of Appeal a set of complete newspaper clippings from the *Berkeley Daily Gazette*, the *San Francisco Chronicle*, and the *Oakland Tribune* from December 1, 1966 to March 15, 1967, describing the controversy and illustrating the setting for the Court's pretrial order. Such a procedure is authorized by *In re Berry*, 68 Cal.2d 137, 143 (1968) and was accepted by the Court of Appeal below.

sity and the City of Berkeley as the "target city of the leftward movement."

While some faculty members expressed support for the strike demands, others joined Chancellor Roger W. Heyns in declaring that "outsiders came on campus with the intention of breaking campus rules and they did so. In addition, state laws were violated and arrests were made. . . . The University must have the authority to protect itself from such illegal intrusions to insure its operation and integrity." (Item C-2, *Gazette* clippings.) Governor-Elect Reagan charged that petitioners were "middle-aged juvenile delinquents hanging around the University." (Item b, *Oakland Tribune* clippings.) An *Oakland Tribune* editorial on the subject warned against granting any amnesty in the cases. (Item b-2, clippings.)

The context, then, in which petitioners were brought to trial on the original charges had been infused with political controversy touching such fundamental questions as the right of free speech on the campus, the right of nonstudents to be present on the campus, the right of the University to order its affairs by campus regulation, the propriety of calling in "outside" police officers to control campus disorder, and the motivation for arrest of nonstudents as contrasted with student "sit-in" leaders.

Although the controversy was intense and far-ranging in scope, it was hardly new or unique to the University, the State of California, or the courts of that jurisdiction. In large measure it was a replay of many of the events which occurred during the 1964 "Free

Speech Movement" crisis at the Berkeley campus of the University. Then, as in 1966, individuals were arrested on the University campus upon charges of unlawful assembly and trespass. Then, too, "confrontation" between students and administration was the keynote of the day. Yet no one in 1964 supposed that trial of the "Sproul Hall sit-in" was in jeopardy unless restrictive orders of the kind here involved issued from the trial Court. Indeed, the judicial system in California has managed and still manages to cope with a large number of "civil rights" trials arising out of such diverse events as the early "civil rights sit-ins", the Berkeley student crisis and the recent San Francisco State and Berkeley "People's Park" disturbances, all without any indication that the "gagging" of the defendants was or is essential in order to protect the fair administration of justice (See, *e.g.*, *In re Bacon*, 240 Cal.App.2d 74, 49 Cal.Rptr. 322 (1966) (sustained criminal trespass statute in its application to a mass sit-in at the University of California arising out of Sproul Hall sit-in).[3]

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[3]Nor are the courts of California unique in this respect. In such celebrated cases as the *Spock* prosecution in Massachusetts, which likewise involved far-ranging political issues, no attempt was made to impose pretrial "gag" orders in the name of securing a fair trial. By way of contrast, pretrial publicity orders affecting criminal defendants have been issued in the *Sirhan* case in Los Angeles and in the *Ray* case in Tennessee. But both of these capital cases are properly classified as "sensational" within the meaning of the recent Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, under the chairmanship of the Honorable Irving R. Kaufman. See 45 Federal Rules Decisions 391 (1969). The Kaufman committee report contains no discussion of the issue presented here, *i.e.*, the scope of the right of free speech of the criminally accused in a political controversy where the accused does not desire the putative protection of a pretrial publicity order.

2. Proceedings Below.

On June 19, 1967, petitioners filed a petition for a writ prohibiting the respondent Municipal Court from proceeding with trial of the criminal contempt charges on the ground that such a trial was in excess of Municipal Court jurisdiction. (C.T. 1-10.) The petition followed an unsuccessful challenge to jurisdiction in the Municipal Court by way of demurrer. See *Whitney v. Municipal Court,* 58 Cal.2d 907 (1962).

This procedure is a traditional part of California jurisprudence: "The most recent cases recognize that the requirement that a defendant in a criminal case stand trial by a court which acts without or in excess of its jurisdiction is an imposition of personal hardship upon the defendant and a futile expense to the public." *Moore v. Municipal Court,* 170 Cal.App.2d 548, 552 (1959). In such cases California law deems the right to appeal to be an inadequate remedy. *Hunter v. Justice Court,* 36 Cal.2d 315 (1950); *Patterson v. Municipal Court,* 232 Cal.App.2d 289 (1965).

The claim that respondent Municipal Court acted in excess of its jurisdiction rests on the premise that the "pretrial publicity order" violated petitioners' constitutional rights, and accordingly, that it was not "lawfully issued" within the meaning of Penal Code § 166(4). (C.T. 4.) It is now well settled in California that the Courts of that state are without jurisdiction to subject a citizen to criminal prosecution for the violation of an unconstitutional statute, ordinance or court order. *In re Berry,* 68 Cal.2d 137, 145-

146 (1968). It is equally well settled that an order void for unconstitutionality is never binding and that its violation cannot constitute contempt. *In re Berry, supra,* 68 Cal.2d at 147-149, and cases cited therein. See also *Hughes v. Superior Court,* 32 Cal. 2d 850 (1948), affirmed 339 U.S. 460 (1949). These principles are unquestioned by the majority opinion in the Court of Appeal.[4]

On June 23, 1967, an Alternative Writ of Prohibition issued out of the Court below (C.T. 15-18) and on June 28, issue was joined by Answer filed on behalf of respondent by the District Attorney of Alameda County (C.T. 19-23). The Answer does not controvert any of the factual allegations in the Petition for Writ of Prohibition. On July 6, 1967, the Superior Court entered its order denying the petition. Judgment was entered in favor of respondent on August 25, 1967 and appeal was duly noticed on August 29, 1967 (C.T. 42-44).

3. Opinion and Judgment Below.

The majority opinion below, relying upon *Sheppard v. Maxwell, supra,* authorizes trial courts to impose sweeping pretrial limitations on the free speech of the accused in any case involving issues of public controversy without any showing that the

[4]In this respect California law differs fundamentally from the common law doctrine applied in *United States v. United Mine Workers,* 330 U.S. 258 (1947). It also differs from Alabama procedure which denies the individual the right to test the constitutionality of an order by inviting contempt proceedings for its violation. The Alabama procedure was upheld as constitutional in *Walker v. Birmingham,* 388 U.S. 307 (1967). See discussion of *Walker* in *In Re Berry, supra,* 68 Cal.2d at 149.

restraint imposed is necessary to prevent serious and imminent danger of an unfair trial. Moreover, even in situations where such an order might be justified the majority opinion below would sanction judicial restraints which are not narrowly confined to specific types of prejudicial matters clearly threatening the fairness of a trial and which are so vague and indefinite as to contravene the first essentials of due process. In truth, the majority opinion constitutes an unprecedented inversion of basic constitutional priorities relating to free speech. Heretofore, prior restraints on expression, because of their "chilling effect" on First Amendment freedoms, have uniformly been deemed more difficult to sustain than subsequent punishment directed to the self-same conduct. But the Court below now sanctions prior restraints prohibiting far broader categories of public expression than could be punished as contempt under the clear and present danger test absent a "pretrial publicity order". *Sheppard* thus becomes not a shield for the accused, but a sword for the accusor.

As noted above, petitioners have sought all redress available to them under California procedure, both by Petition for Rehearing in the Court of Appeal and by Petition for a Hearing by the Supreme Court of California, but to no avail. This Court has previously exercised jurisdiction in a case arising in the same procedural posture. See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

STATEMENT OF THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED—IN COMPLIANCE WITH THE RULE 23-1(f)

Petitioner's initial pleading in the courts of the State of California invoked the protection of the United States Constitution as the grounds for prohibiting maintenance of the contempt proceedings against them for violating the "pretrial publicity order". When relief was denied, the constitutional questions here raised were argued in petitioners' briefs in seeking reversal. They subsequently served to divide the Court of Appeal. Under California procedure, no assignment of errors is required or permitted upon appeal; such errors and issues as are presented to the appellate court are set forth in the briefs of the parties. Similarly, with respect to proceedings on a Petition for a Hearing before the California Supreme Court, the entire record before the Court of Appeal, including briefs and the opinions, constitute the record before the California Supreme Court. All of the federal questions which are referred to in this Petition for Writ of Certiorari have thus been raised by petitioners in timely and traditional fashion and persistently pursued.

REASONS FOR GRANTING THE WRIT

Petitioners stand charged with criminal contempt for conduct which unquestionably constitutes "pure speech". See, *e.g.*, *Tinker v. Des Moines Community School Dist.*, ... U.S. ....., 21 L.Ed. 731 (1969), (wearing of armbands in Vietnam War protest held

akin to "pure speech," and thus constitutionally protected). That conduct violates the terms of a "pretrial publicity order" avowedly issued as a prior restraint upon such speech. Thus, contrary to the principles uniformly recognized by this Court, prior restraint by injunctive order, unimpeded by the clear and present danger test, was accepted as the constitutional norm.

The singular authority relied upon by the Court of Appeal is *Sheppard v. Maxwell, supra.* In essence, the guidelines there suggested for protecting a defendant's constitutional right to a fair trial are transmuted by the Court of Appeal into a precedent justifying the overruling of the clear and present danger test as the established limitation on restricting the right of free speech. These proceedings thus present vital questions concerning the intended scope of *Sheppard,* transposed to fact circumstances where the criminally accused affirmatively desire to exercise their right of free speech.

The question is vital not only to those to whom the instant order applied, petitioners and the entire University Community of Berkeley, California, but to all Californians and indeed to the entire nation, for broad "pretrial publicity orders" have proliferated throughout the United States. Whenever a trial excites public interest there is the danger that public discussion about the trial and "issues related to it" will be prohibited. Whenever these orders are issued there is the danger that they will be drawn, as the instant one was, in the broadest possible language;

whenever these orders are adopted there is the danger that they will be predicated, as the instant one was, on the theory that free expression must always be the loser where there is the remotest possibility of a clash with the integrity of the judicial process.

Additionally, the question is vital because pretrial publicity orders have the potential and effect of inhibiting public discussion of the most vital issues of the day. In 1835 de Toqueville observed that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 *Democracy In America,* 280 (Bradley ed. 1948). That observation also proved to be an excellent prediction. In *Bridges v. California,* 314 U.S. 252, 268-269 (1941), this Court said:

> It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

> No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted.

Harry Bridges is no longer a figure of great controversy and the *Los Angeles Times'* anti-labor militancy has been attenuated during the passage of time. But labor disputes continue to generate heated emotions and it is the labor disputes of greatest contemporary significance that are likely to find their way into the courts. See *Chavez v. Municipal Court,* 256 Cal.App.2d 149, 157 (1967) (involving California farm-workers union). The other profound social issues of our time also have been reflected in litigation. See *Shuttlesworth v. Birmingham,* ..... U.S. ....., 22 L.Ed.2d 162 (1969) (civil rights activities); *Bond v. Floyd,* 385 U.S. 116 (1966), (anti-war sentiment); *Hamilton v. Municipal Court,* 270 A.C.A. 885 (1969) (this case) (campus unrest and anti-war activity). If a court can cut off public debate on any "issues" surrounding a case before it, it can, clearly, cut off public debate on the most important and vexing questions in the nation and in the community where the trial occurs. Such a sweeping power to abrogate the First

Amendment exists neither in the legislature nor in the judiciary.

Petitioners do not maintain that courts have no power to limit public discussion of cases before them. Such a position would be in conflict with *Sheppard v. Maxwell, supra,* and, if adopted, would undermine the right to a fair and impartial trial. But to say that a judge has some power to limit public comments on matters related to a case before his court is not to say that he may limit public discussion totally or that he may choose any means he deems convenient for enforcing his legitimate powers.

1. The need for review of the issues relating to Sheppard v. Maxwell as authority for judicial restrictions upon the right of free speech of the criminally accused by "pretrial publicity orders" (Questions 1 and 2).

In a series of landmark cases this Court has enunciated the rule that the right of free speech might be qualified if, but only if, it is demonstrated that there exists "a clear and present danger of serious substantive evils of a high degree of imminence." *Thomas v. Collins,* 323 U.S. 516 (1945). When, as in the case at bar, the claimed justification for prior restraint upon free speech relates to an alleged impairment of the fair administration of justice, the same clear and present danger rules are established as controlling. The leading case, of course, is *Bridges v. California,* 314 U.S. 252 (1941), involving a *Los Angeles Times* editorial calling certain convicted defendants "gorillas", and warning the judge who was to sentence them that they had better not be granted

probation, and a telegram from labor leader Harry Bridges threatening a paralyzing strike if a judicial decision were enforced. The possible conflict between two constitutional values was recognized and the values of free expression held paramount except where this test is met:

> ". . . the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished. (314 U.S. at 263.)"

This exact test has been consistently reiterated by this Court whenever the contempt problem has arisen. *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Craig v. Harney,* 331 U.S. 367 (1946); *Wood v. Georgia,* 370 U.S. 375 (1962). For state court authorities involving an alleged impairment of the administration of justice by extrajudicial speech see, *Worcester Telegram & Gazette, Inc. v. Commonwealth,* 238 N.E.2d 861 (Mass. 1968); *Crosswhite v. Municipal Court,* 260 Cal. App.2d 428 (1968).

While giving lip service to the clear and present danger test, the Court of Appeal majority regards that test as having been satisfied by the mere existence of public controversy or publicity concerning the criminally accused and their conduct. Thus, the majority suggests that an imminent danger existed that "prejudicial publicity" would impair a fair trial simply because at the time of the "pretrial publicity order" there was a "highly charged atmosphere" of extensive "lawlessness and student strife on the campus of the University of California at Berkeley." The

majority further emphasizes that the arrest of petitioners was attended by wide publicity and their distribution of statements attacking the University and charging political motives for the prosecution. (Exhibit A, p. vi.) The Court below thus substituted a "tendency" test for the "clear and present danger" test, a substitution explicitly disaproved by this Court in *Bridges v. California, supra,* 314 U.S. at 273.

The upshot of the Court's opinion is that participation in a controversy of wide political and public interest which results in criminal charges against some of the participants becomes the basis for significant restrictions upon continued public discussion about that controversy. And that justification is supposedly enhanced by the fact that the participants have publicly criticized public institutions and officials in connection with their arrest and prosecution.

That reasoning simply cannot be squared with the constitutional right of free speech. For that freedom is most highly cherished for its value in fostering uninhibited freedom of public expression and debate on matters of public concern and controversy (e.g., *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964)) as well as "subjecting police, prosecutors and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell, supra.* The majority's approach poses the grave threat that public discussion, dissent and criticism by those directly participating in controversial activities not favored by public officials or the majority can be silenced simply by commencing criminal proceedings against some of

them based on their conduct in support of unpopular or disfavored causes.

Unless free speech is meaningless, the fact that the criminal charges were the product of and were surrounded by widely publicized political controversy—participated in not only by defendants but by the press and the highest state and university officials—supplies reason for *encouraging* rather than *restraining* the exercise of free speech on *all* aspects of the controversy. Far from indicating that the clear and present danger test is met, these factors conclusively establish the opposite. Thus, the substantial publicity already given to the demonstrations and protest activities in which petitioners were engaged—much of it adverse to and critical of petitioners—made it inconceivable that potential jurors could be immunized from public discussion of the issues, even if that were constitutionally justifiable. It is, after all, impossible to perceive how petitioners' public reiteration of their views and defense of their cause could significantly increase the claimed danger of an unfair trial.

But more fundamentally, where judicial proceedings are spawned and surrounded by controversies involving political and other issues of public concern, the mere fact that prospective jurors are exposed to public discussion of those issues by persons directly involved therein cannot be equated with a clear and present danger of an unfair trial. To the contrary, continued public discussion of such proceedings and the related issues is an inevitable fact of political life, something normally expected by members of the com-

munity, including prospective jurors, in their capacities as citizens. Indeed, it is the basic tenet of our constitutional and political system that all members of the public should have access to information, ideas and discussion concerning such controversies, put forward by all participants therein. Given these factors, it is both constitutionally impermissible and totally illogical to presume—as does the majority below—that the exposure of prospective jurors to continued public discussion of controversies which become involved in court proceedings creates a clear and present danger that such jurors will be incapable of rendering a fair verdict on the evidence presented under appropriate instructions from the Trial Judge. As Presiding Justice Draper points out in his dissent it is undisputed that there was no evidence before the Trial Court here of any past or threatened events which would establish that the exposure of jurors to such publicity would clearly and imminently endanger a fair trial. In fact, the reverse is clearly indicated by the many situations in which the courts of California and other states have adequately coped with trials involving "civil rights" demonstrations, anti-war protests, student disturbances and similar activities without resorting to "gag orders" supposedly necessary to preserve the fairness of the trial.

In the final analysis, the majority opinion and the "pretrial publicity order" it sustains seem to proceed on the notion that whenever any aspect of a matter of public concern finds its way into judicial proceedings—as so often happens in our society—the court becomes the exclusive forum in which all issues in-

volved may be evaluated and resolved. Despite their direct participation in the public controversy, defendants subject to criminal charges are suddenly precluded from expounding their views on these issues in the forum of public opinion. And because of their involvement in the criminal proceedings they are precluded from publicly asserting claimed abuses or improprieties in the conduct of public officials related to those proceedings at the very time when such criticism would be most effective. Meanwhile, the public's interest in evaluating and debating the issues involved, the merits of defendants' conduct, and the propriety of official conduct—quite apart from their relevancy to technical legal guilt or innocence—is subordinated to the supposed "sanctity of judicial proceedings."

But this radical notion of the preeminence of the "judicial concern" flies in the face of our whole political tradition and democratic values. Our courts are part of our political and social system, not above it. Neither they nor jurors can be immune from political and public controversy. They cannot stifle criticism or suppress anyone's participation in such controversy merely in the name of protecting the fair administration of justice. The courts must continue to recognize that issues of public concern should and will continue to be debated and discussed outside the context of judicial proceedings which may themselves involve the same or related issues. To allow the mere pendency of such proceedings to be the basis for silencing significant participation in such public discussion and debates is to work intolerable injury to our vital freedoms.

The foregoing analysis is not at all affected by this Court's opinion in *Sheppard v. Maxwell, supra.* There, while holding that Dr. Sam Sheppard had been denied due process of law by reason of the "inherently prejudicial publicity which saturated the community" and by the trial court's failure to "control disruptive influences in the courtroom," this Court pointed out that reversals are but palliatives and suggested that trial courts take preventive steps to inhibit the growth of such a prejudicial atmosphere. But the "remedial measures" suggested by this Court do not authorize the impairment of a defendant's right of free speech in the manner attempted at bar.[5] Those measures were

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[5]That portion of this Court's opinion which is most pertinent follows:

"More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness or court official *which divulged prejudicial matters,* such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. . . .

". . . Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . The courts must take steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." (384 U.S. at 361-363, emphasis added.)

clearly intended for protection of a defendant's constitutional right to a fair trial against the danger that "prejudicial matter" would be divulged. The Court did not contemplate that its protection of this right would be turned into a warrant to silence defendants from all meaningful discussion of their cases and the issues surrounding their cases. At a minimum, the First Amendment requires direct proof that specified information would have a prejudicial effect on the trial if released, that the harm could not be prevented by alternative means,[6] and then would limit the order to the material so specified. Any other interpretation of *Sheppard* would assume the overruling of *Bridges* and its progeny, a result not remotely hinted at in *Sheppard*. When, as here, the nature of the dispute is of a far-ranging political character, it is inconceivable that the accused's pretrial statements could constitute the type of "prejudicial information" which was of concern in *Sheppard*. Even if such a possibility existed, the First Amendment requires any restraint to be narrowly drawn so as not to infringe upon the rights of Americans—be they criminally accused or otherwise—to criticize public officials and to participate in the public debate which is going on outside the courtroom.

There are at least three additional policy reasons why *Sheppard* should not be read as authorizing the sort of "pretrial publicity order" issued by the Municipal Court, at least insofar as it relates to the

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[6]See *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); see also Wormuth and Mirkin, "The Doctrine of the Reasonable Alternative," 9 Utah Law Rev. 254, 267-78 (1964).

criminally accused. First of all, such a reading would provide public officials with a weapon of enormous utility in suppressing or deterring expression with which they may differ. Individuals engaged in demonstrations or other conduct in support of causes or principles not favored by either governmental officials or a majority in the community, such as civil rights advocates, war protestors, white supremacists, or labor pickets, could be silenced under jeopardy of contempt by the simple expedient of commencing criminal proceedings against them. Such a result is wholly inconsistent with the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941).

Secondly, the adverse publicity resulting from an arrest, arraignment or indictment might have the effect of stripping the accused of his good name and reputation—personal and economic assets which subsequent acquittal might not restore in full. The only effective redress might well be instantaneous exclamation of innocence coupled with a detailed explanation of why a particular course of conduct was pursued. Examples are endless: an assertion that the conduct was constitutionally justified and protected as in petitioners' statement at bar; that the conduct was motivated by the dictates of conscience, as in the instances of religious objections to military service; or that the conduct was provoked or induced by the improper or illegal acts of police or other officials. Yet such extrajudicial communications would run afoul of the "pre-

trial publicity order" issued here. Such a result cannot be squared with the constitutional right of free speech.

Thirdly, and quite aside from concern over one-sided publicity, such orders effectively prohibit the criminally accused from making any extrajudicial statement designed to expose abuses or misconduct by prosecution or court officials in connection with the case. Cf. *Pennekamp v. Florida, supra.* Such a limitation upon the right of free speech frustrates one of the great purposes of First Amendment freedoms, namely the guarding "against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell, supra,* 384 U.S. at 350.

In short, *Sheppard* provides no authority for upholding the constitutionality of the "pretrial publicity order." As before *Sheppard,* respondent is obligated to meet the clear and present danger test of the *Bridges* case. Unless petitioners are accorded relief in this Court, the *Sheppard* opinion will continue to be used as authority for emasculating the right of free speech of individuals charged with crimes.

2. The need for review of the issues relating to the overbreadth and vagueness of the pretrial order (Questions 3 and 4).

The grave implications of the majority opinion below do not stop with what we believe to be its erroneous acceptance of the constitutional propriety of a "pretrial publicity order" in the instant circumstances. The dangers to free speech are greatly aggravated by the terms of the order which the majority

sanctions. For that order, which must be judged on its face, ranges far beyond any legitimate need to prevent an unfair trial. Instead of being narrowly confined to the kinds of prejudicial extrajudicial communications which would clearly and imminently endanger the trial's fairness, it constitutes a sweeping interdiction upon all statements by petitioners and others concerning any of the publicly debated issues which might become involved in the pending judicial proceedings.

To be sure, the majority appears to recognize that if any restraint on free speech is justified by legitimate state interest, it must be drawn with narrow specificity so as to be no broader than what is minimally necessary to prevent the evil sought to be regulated. (Exhibit A, pp. vii-viii.) As this Court has taught, a restraint on free speech is necessarily invalid if the substantive evil could be obviated by restraints less restrictive of free expression. *United States v. Robel*, 389 U.S. 258 (1967); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Schneider v. State*, 389 U.S. 749 (1962). The rule is particularly appropriate in regard to a prior restraint which bears "a heavy presumption against its constitutional validity," and is invalid if, in any of its applications, it is broader than necessary or would infringe clearly protected expressions. See, e.g., *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). The operative principles have never been stated more succinctly than in *Carroll v. Commissioners of Princess Anne County*, ... U.S. ....., 21 L.Ed.2d 325, 332-3 (1964) where, in striking down an *ex parte*

injunction as violative of free speech guaranties, this Court stated:

> "... An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 U.S. 479, 488, 5 L.Ed.2d 231, 237, 81 S.Ct. 247 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. ..."

But while again paying lip service to these principles, the majority opinion below actually constitutes a radical departure from them. For it expressly approves an order prohibiting the parties, including petitioners, from "directly or indirectly" releasing or expressing any "information or opinion concerning the trial or any issue likely to be involved therein" (other than date and place of trial, names of parties and counsel, contents of complaint and plea of defendants); and it further proscribes any "public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy."

Such an order cannot withstand scrutiny under the doctrine of overbroad restrictions on First Amendment rights. For this order is not confined to those kinds of "prejudicial matters"—contemplated by *Sheppard*—which might be demonstrated to create

a clear and present danger that a fair trial could not be had. To the contrary, it purports to bar public expression unquestionably entitled to constitutional protection. Thus, its language bars comments by the defendants on almost the entire range of controversial university issues surrounding their arrest and prosecution; virtually any such issue, after all, may become "involved" in the trial or may touch on the "merits" of the complaint or "arguments" to be adduced. In a word, it effectively barred petitioners from continuing to participate in the public controversy over both university issues and their own conduct. It swept "within its condemnation speech which our Constitution has immunized from governmental control." *Brandenburg v. Ohio,* ..... U.S. ....., 89 S.Ct. 1827, 1830 (1969).

And since the order so reads, the vice of unconstitutional overbreadth cannot be cured by subsequent rationalizations that it might have been interpreted more narrowly. Prior restraints in the First Amendment area, whether imposed by law or order, are void on their face in their entirety if they are overbroad or vague. *N.A.A.C.P. v. Button, supra; Shuttlesworth v. City of Birmingham,* 22 L.Ed.2d 162 (1969); *Gregory v. Chicago,* 22 L.Ed.2d 134 (1969); *In re Berry,* 68 Cal.2d 137, 155 (1968).

In seeking to justify the broad language and application of the "pretrial publicity order," the majority opinion does not even suggest that the order was confined to restraining only the kinds of prejudicial statements which would directly create a clear and present

danger of an unfair trial. Rather, the sole rationale is as follows:

> "It must be remembered that the order was announced in the atmosphere of a widely publicized controversy concerning campus lawlessness and disorder, and that great public attention was focused upon the arrest of the defendants and their pending trial. It was a near certainty that tensions would not abate during the interval between arrest and trial. The Court's order sought only to have the issues judicially determined in open court, on competent evidence, rather than by the community upon the basis of information supplied by partisans and carried by the news media." (Exhibit A, p. viii.)

This language demonstrates once again the principal vice of the Court of Appeal's approach to the matter of pretrial orders restricting a defendant's extrajudicial communications: the very fact of intense public controversy over conduct and issues partially involved in pending judicial proceedings is made the basis for broad and sweeping restraints upon the further participation of defendants in that controversy. Such an approach inverts constitutional priorities by allowing the broadest prior restraints to be imposed most readily in situations where the public interest in freedom of expression is greatest and the value of the exercise of the right of free speech is highest. Here, also, the majority suggest the notion that when the public controversy is somehow drawn into judicial proceedings, the interest in having "the issues judicially determined" requires that the community's consideration and debate over the same issues, and the continued

participation by the defendants therein, must be sharply curtailed. And this concept is carried to its extreme in the majority's express approval of the extension of the order to prohibit law enforcement officials and even non-party university officials and associated students from commenting on the merits of "issues likely to be involved in" the trial. The majority's theory is that because *some* of the public controversy must be resolved in the courtroom, the controversy must, in all aspects, be removed from the arena of public debate.

The consequences of that approach are alarming. It can be applied in every case involving criminal proceedings arising out of demonstrations or disturbances, as a vehicle to prohibit all comments on the propriety or handling of such situations whether emanating from the accused or others. But such a free-wheeling blackout on public discussion cannot be tolerated in our society. In situations like those involved in the case at bar, a criminal trial is but one minor aspect of the entire public controversy. The issues involved are not solely for judicial determination. Despite the pendency of court proceedings involving such issues, all citizens have a continuing interest in hearing pertinent information, opinions and arguments put forward by all participants in the controversy. And those participants—be they criminal defendants or otherwise—have a constitutional right to continue to put their case to the public and criticize public officials and institutions. The First Amendment requires nothing less.

The constitutional vice of overbroad restrictions evident on the face of the order is matched by the vice of vagueness and indefiniteness which renders enforcement of the pretrial order violative of due process guarantees. For our fundamental law holds that no individual may be required at peril of life, liberty, or property to speculate as to the meaning of a state command. *N.A.A.C.P. v. Button, supra.* And vagueness is particularly condemned where First Amendment rights are at stake. *Ashton v. Kentucky,* 384 U.S. 195, 200 (1966).

Measured against due process standards, the publicity order is patently infirm. For "men of common intelligence" it is impossible to ascertain or even understand the scope of prohibition against "directly or indirectly" releasing to any news media "information or opinion concerning the trial or *any* issue likely to be involved therein." This sweeping directive precludes a statement asserting that the case involves important constitutional issues. Such a statement is assuredly constitutionally protected and could not possibly affect the fair administration of justice. If it should be argued that the order does not embrace such a statement, then it is not sufficiently explicit to meet the vagueness test because, on its face, the order surely prohibits such comments.

Other examples of uncertainty are manifold. For example, that portion supposedly specifying proscribed acts only confounds the meaning of the order by broadening its ban to embrace "without limitation" not merely releases to the press, but any "public

statements" relating to the subject of the order. As for the particulars themselves, what are "the merits of the complaint" with reference to which the Municipal Court precludes comment? What is a "public statement" "indirectly released"? Would such a prohibition include comments to friends or relatives which might make their way to a newspaper reporter? Moreover, it is difficult to perceive how a layman might know what is embraced within prohibitions concerning "evidence or arguments to be adduced by either side" or "trial tactics or strategy."

Pretrial orders of the breadth and vagueness of that at bar carry with them the threat of sanctions which may deter the exercise of free speech almost as potently as the actual application of sanctions. See *Keyishian v. Board of Regents,* 385 U.S. 589, 604 (1967).

The stifling effect on free expression created by the instant order is exacerbated by the persons encompassed in its sweep. It applies not only to the parties in the litigation, local law enforcement agencies and the petitioners, but "to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations." The order prohibited public discussion of "an issue likely to be involved" by anyone remotely interested in the underlying controversy. A broader restraint on free expression is difficult to imagine.

Because of the "chilling effect" overbroad regulations have on freedom of expression, it is entirely appropriate for this Court to consider the application of the challenged order to persons other than petitioners. *Dombrowski v. Pfister,* 380 U.S. 479, 486-487 (1965). The fundamental liberties of free speech and press "are delicate and vulnerable, as well as supremely precious in our society." *Elfbrandt v. Russell,* 384 U.S. 11, 19 (1966); *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-433 (1963). Their exercise is not simply to be tolerated but rather encouraged. See *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949); *Stromberg v. California,* 283 U.S. 359, 369 (1931). They are "essential to the workings of a free society." *Speiser v. Randall,* 357 U.S. 513, 521 (1958). An order inhibiting the exercise of these precious liberties must be considered in light of "its effect on those who believe the written law means what it says." *Baggett v. Bullitt,* 377 U.S. 360, 374 (1964). A vague and overbroad law will cause persons to steer far wide of the ambiguous zone created by its breadth, *Speiser v. Randall, supra,* 357 U.S. at 521, for "those covered by the [order] are bound to limit their behavior to that which is unquestionably safe," *Keyishian v. Board of Regents,* 385 U.S. 589, 609 (1967), and "Free expression—of transcendant value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski v. Pfister, supra,* 380 U.S. at 486; cf. *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Accordingly, when First Amendment rights are at stake "precision of regulation must be the touch-

stone," *United States v. Robel,* 389 U.S. 258, 265 (1967); *Keyishian v. Board of Regents, supra,* 385 U.S. at 602-603; *N.A.A.C.P. v. Button, supra,* 371 U.S. 415, 438 (1963).

> "If the line drawn by the [State] between . . . permitted and prohibited activities . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. . . . For in appraising a statute's inhibitory effect upon . . . rights [of free expression], this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."
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> *N.A.A.C.P. v. Button, supra,* 371 U.S. at 432-33.

Accord:

Aptheker v. Secretary of State, 378 U.S. 500, 516-517 (1964);

N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964);

Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961);

Shelton v. Tucker, 364 U.S. 479, 488 (1960);

Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957);
Martin v. Struthers, 319 U.S. 141, 146-149 (1943);
Cantwell v. Connecticut, 310 U.S. 296, 304-307 (1940);
Schneider v. State, 380 U.S. 147, 161, 165 (1939).

CONCLUSION

Petitioners recognize that promoting impartial trials is a state interest of great magnitude. Petitioners, after all, were presumptively the principal beneficiaries of an impartial trial. Since guaranteeing an impartial trial is a state interest of such magnitude, doubtless there are and will be situations in which expression otherwise protected by the First Amendment will have to be circumscribed in order to insure that the interest will in fact be protected. But that is not the case here. *United States v. Robel,* 389 U.S. 258, 263-264 (1967), teaches that governmental interests of the greatest magnitude "cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit." For "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). Since the trial court could obviously

have drafted an order which would guarantee an impartial trial without shutting off all public debate on the controversy, there was open to it a means with a "'less drastic' impact on the continued vitality of First Amendment freedoms." *United States v. Robel, supra,* 389 U.S. at 268. Since the means used were too drastic it becomes unnecessary for this Court to "balance" the competing interests of "fair trial" and "free speech" to determine in what circumstances the latter must cede to the former. *Ibid.,* fn. 20. The "less drastic means test" and the presumption against the validity of prior restraints are two syllogistic predicates leading ineluctably to the conclusion that petitioners cannot, consistent with the Constitution, be criminally punished for the exercise of their First Amendment rights.

For the aforementioned reason, petitioners respectfully submit that the relief prayed be granted.

Dated, San Francisco, California,
August 1, 1969.

Respectfully submitted,

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(Exhibits A, B, C and D Follow)

Exhibit A

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 25,126

Steven Hamilton, Michael Smith, Stewart Alpert and Jerry Rubin,
Plaintiffs and Appellants,
vs.
The Municipal Court for the Berkeley-Albany Judicial District,
Defendant and Respondent,
People of the State of California,
Real Party in Interest and Respondent.

OPINION

On November 30, 1966 a complaint was filed in the Municipal Court for the Berkeley-Albany Judicial District which charged the defendants, who are the appellants here, with violating Penal Code sections 372 (committing a public nuisance) and 602 (unlawful occupation of real property or structures). These charges grew out of a widely publicized demonstration on the campus of the University of California at

Berkeley, protesting the presence of recruiters for the armed services of the United States.

At a pretrial hearing the court, in an effort to secure a fair trial for the parties, issued an order, the pertinent parts reading thus: "A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy. B. This order shall apply inter alia to the parties and their counsel, to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations. The court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The court will entertain motions for any further orders that may be necessary or desirable in this matter."

Trial was set for Monday, January 16, 1967. On Friday, January 13, in front of the Municipal Court Building where the trial was to take place, the defendants held a press conference, and issued a statement to the news media for immediate release. The

statement condemned the court's pretrial order and openly and deliberately violated its restrictions.

The defendants were convicted of the charges against them. They were then charged with violation of Penal Code section 166(4) (criminal contempt) for their wilful disobedience of the pretrial order. They sought prohibition from the Superior Court of Alameda County to prevent their prosecution. The writ was denied. This appeal followed.

Appellants first argue there was no justification for the municipal court's pretrial order because it is an unconstitutional restriction upon their right of free speech. They cite and rely upon *Bridges v. California* (1941), 314 U.S. 252; *Fort v. Civil Service Commission,* 61 Cal.2d 331, 337-338, and *Bagley v. Washington Township Hospital Dist.,* 65 Cal.2d 499, 506-509. But in *Sheppard v. Maxwell* (1966), 384 U.S. 333, the United States Supreme Court recognized the danger to the right of fair trial by unwarranted and prejudicial publicity, and suggested a method whereby the right of fair trial could be preserved without an unconstitutional encroachment upon the equally protected rights of free speech and free press. In *Sheppard* the court said the trial court in that case ". . . might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence;

or like statements concerning the merits of the case." (p. 361). Again, at page 363, the court declared: "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." We construe this language of the court to mean that in proper cases, where the right to a fair trial may be at issue, the court is required to take steps to control the release and dissemination of facts and evidence likely to be presented to the court or the jury in the course of the trial. Thus authority for issuance of the pretrial order in this case seems to us unassailable.

Appellants argue in effect, however, that direct proof must be made that specified information will have a prejudicial effect upon the trial before a valid order may be made limiting distribution of such material. We do not accept this view. Although pretrial orders must be carefully drawn so as not to unduly restrict protected rights, it is virtually impossible for any order to cover every aspect of evidence, fact or information that may arise. Moreover, the trial judge cannot be made the personal censor of every statement contemplated by each participant in the trial. An order specific enough so that all parties know what is proscribed is sufficient.

Appellants next contend that the pretrial order was issued without reference to the clear and present dan-

ger test. (See Schenck v. United States, 249 U.S. 47, 52; Thomas v. Collins, 323 U.S. 516; Weaver v. Jordan, 64 Cal.2d 235, 243.) In *Bridges* (p. 263) the court said: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Here, the evil the trial court sought to prevent by its order was the denial of a fair trial to all parties by harmful and prejudicial publicity generated by those involved in the proceedings then before the court. The imminence of the danger which the court sought to foreclose is clear. At the time the court made its order, lawlessness and student strife on the campus of the University of California at Berkeley were matters of common knowledge, of which the trial court could take judicial notice. A large number of newspaper articles and pictures have been made a part of the record in this case, and are lodged with us. These publications reflect the extensive nature of student disorder at the time the court acted and while trial was pending. The sole purpose of the court's order was to assure a fair trial, and in the highly charged atmosphere in which the order was made its formulation and announcement was not merely justified but was required by directions contained in *Sheppard*.

Apppellants cite and rely upon *Crosswhite v. Municipal Court*, 260 A.C.A. 444. That case is not helpful to them. In *Crosswhite*, the contemner ran a newspaper advertisement intended to prejudice potential

jurors in favor of the defendant. It was admitted however that neither defense nor prosecution could say whether the advertisement had helped or harmed one or the other. Accordingly the appellate court rightly concluded that the advertisement did not present a "clear and present danger" to the administration of justice and set the finding of contempt aside. In our case however, arrest of the appellants was attended by wide publicity. After arrest and before plea the defendants distributed statements attacking the University, charging their arrest was political and that the trial would be a political trial. In light of prevailing tensions, the probability that the prosecution or defense might issue statements which would interfere with a fair trial was high. The duty of the court to take reasonable measures to assure a fair trial was therefore plain under the requirements stated in *Sheppard*. We think the order of the trial judge, attempting to balance the right of all parties to a fair trial against the equally protected right of free speech, properly issued in this case.

Appellants also argue that the broadness of the court's order interfered with their right to reply to the charges against them. We find this argument to be without merit. The order does not prohibit the defendants from describing the charges against them and unequivocally asserting their own innocence. It does prohibit discussion of the merits of the case and the evidence and arguments that might be presented at trial, and in this respect goes no further than the permissible limits noted in *Sheppard*. Appellants

assert however that language in *Endler v. Schutzbank,* 68 Cal.2d 162, 180, supports their right to reply at length to the charges expressed in the complaint. In *Endler* the court said in part that: ". . . fundamental fairness requires that an individual be permitted to defend himself publicly against official charges, however informal, which threaten to stain his personal and professional future. [Citations.]" That case is readily distinguishable from the one we here consider. In *Endler,* the Corporation Commissioner made charges affecting the reputation of the plaintiff, and thereby precluded his employment in his chosen field of endeavor. The Commissioner offered the plaintiff no more than an informal, administrative hearing before his agency, with the pre-hearing statement that the Commissioner would not be bound by the result of the hearing, whether it favored the plaintiff or not. Thus the plaintiff there could never have secured any vindication of the charges made against him. But in our case, appellants asserted their innocence and were to be given a public trial, with every facility made available to them for the production of evidence and witnesses. The very purpose of the court's order was to guarantee a fair trial before an unprejudiced jury, thus assuring to appellants the right to make an effective reply to the charges made in the People's complaint.

Appellants further argue that the pretrial order must fall because it fails to meet constitutional standards which require the order to be formulated with narrow specificity so as to meet the particular evil

sought to be regulated. (See N.A.A.C.P. v. Button, 371 U.S. 415, 433; Cantwell v. Connecticut, 310 U.S. 296, 311; Fort v. Civil Service Commission, supra, 61 Cal.2d 331, 337, and cases cited.) We do not think the order made in this case fails to meet the required standard. It must be remembered that the order was announced in the atmosphere of a widely publicized controversy concerning campus lawlessness and disorder, and that great public attention was focused upon the arrest of the defendants and their pending trial. It was a near certainty that tensions would not abate during the interval between arrest and trial. The court's order sought only to have the issues judicially determined in open court, on competent evidence, rather than by the community upon the basis of information supplied by partisans and carried by the news media. The order applied to the parties and their counsel. Such persons were before the court, and subject to its proper orders. Nor can there be any successful attack upon the order because it also applied to law enforcement agencies, the Regents of the University and the Associated Students. Although the University was not a party to the proceedings, it was the party said to have been directly offended by the conduct of the defendants, and agents and officers of the University might well have been witnesses at the trial. The same may be said of the Associated Students of the University. They were involved in matters touching upon the merits of the issues then before the court and were potential witnesses. *Sheppard* enjoined trial judges to protect the sanctity of trial proceedings by guarding them from the

unwarranted statements of ". . . prosecutors, counsel for the defense, the accused, witnesses, court staff [and] enforcement officers coming under the jurisdiction of the court. . . ." the court's order made in this case complies with the mandate of *Sheppard*, and we must uphold it.

The judgment is affirmed.

Salsman, J.

I concur:

Brown (H. C.), J.

I dissent.

Defendants' brazenly flagrant flouting of an order obviously made for their own protection can hardly evoke sympathy for them. Nonetheless, I feel that the pretrial order of the municipal court goes beyond permissible limits, and thus cannot afford a basis for punishment. (In re Berry, 68 Cal. 2d 137, 147-9.)

The seemingly broad admonition of the United States Supreme Court (Sheppard v. Maxwell, 384 U. S. 333, 363) is subject to limitations recognized but not emphasized in that opinion.

The "clear and present danger" limitation applies. The *Sheppard* opinion cites with approval a number of decisions emphasizing that rule (e.g., Craig v. Harney, 331 U. S. 367; Pennekamp v. Florida, 328 U. S. 331; Bridges v. California, 314 U. S. 252). The essence of that rule is that the "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished"

(Bridges v. California, *supra*, at p. 263). Review of the authorities makes clear that the requisite degree of clarity and imminence is rarely found.

The order here was issued on the court's own motion. Thus we have no moving papers, affidavits, or exhibits. The order contains no recital of facts which were before the court, merely stating that "to secure a fair trial in this case it is essential to keep pretrial publicity to an absolute minimum." This statement, of course, would apply to most cases awaiting trial, and does not show any past or threatened events to establish the requisite degree of clarity and imminence of danger in this trial. Appellants' counsel have lodged with us clippings from three newspapers for the period from December 1 to close of trial, but they have two deficiencies for our present inquiry. It is doubtful that this material establishes the requisite clear and present danger. More important, we do not know that they were before the court or motivated its decision to issue the order. Thus I have grave doubts that this first test of the order has been met.

In any event, the order seems to me too broad and uncertain to support penal sanctions. Overbreadth and uncertainty in a penal statute render it void (Thornhill v. Alabama, 310 U. S. 88; Fort v. Civil Service Com., 61 Cal. 2d 331). When an enactment restricting free speech is attacked upon these grounds, the courts may consider the operation of the enactment as to factual situations and parties other than those presently before the court (N.A.A.C.P. v. Button, 371 U. S. 415, 432-3; In re Hoffman, 67 Cal. 2d 845;

Fort v. Civil Service, *supra*). The rule against overbreadth and uncertainty applies to a temporary restraining order (In re Berry, *supra,* 68 Cal. 2d 137). It seems clear that a pretrial order of the type before us, restricting release of information pending trial, is subject to like limitations.

This orders bars release to news media of "information or opinion concerning the trial or any issue likely to be involved therein." The prohibition was not limited to assertions of views in a context relating them to the issues of the trial, but could be construed to bar even comments which made no reference to the trial, so long as they dealt with any subject "likely to be involved" in it. Similarly, the order could well be read to bar the use of news media by either side in a search for witnesses to the events of the demonstration. I recognize that the trial judge doubtless intended no such restriction, and that violation in these respects was unlikely to be punished. But the rule on overbreadth nonetheless strikes down the order.

Moreover, the restrictions were specifically extended to the "Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations." Literally applied, this restricted students and faculty, not parties to the pending action, from discussing among themselves events and issues of great and immediate concern to them, whenever newsmen might be present. The prohibition of release "directly or indirectly" could have

this effect even if publicity were neither sought nor anticipated.

However provocative the words of defendants, they can be punished only if the order is valid. Disagreement with the words spoken does not warrant limiting the freedom to speak them. Unpleasant as it is to me to deprive defendants of the limited martyrdom for which they seemed so anxious, I would reverse the judgment and direct the municipal court to sustain the demurrer.

Draper, P. J.

Filed March 20, 1969,
Lawrence R. Elkington, Clerk.

Exhibit B

Order Due May 19, 1969

In the Supreme Court of the State of California
In Bank

Hamilton et al.

v.

Municipal Court for the Berkeley-Albany Judicial District

ORDER DENYING HEARING

After Judgment by the Court of Appeal
1st District, Division 3, Civil No. 25,126

Appellants' petition for hearing DENIED.

Peters, J., is of the opinion that the petition should be granted.

Traynor
Chief Justice

Filed May 14, 1969,
William I. Sullivan, Clerk.

Exhibit C

PRETRIAL PUBLICITY ORDER

To assure a fair trial in this case it is essential to keep pre-trial publicity to an absolute minimum. Therefore, and in accordance with the discussion between the court and counsel in the presence of the defendants in open court this day.

A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy.

B. This order shall apply inter alia to the parties and their counsel, to all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations.

The court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The court will entertain motions for any further orders that may be necessary or desirable in this matter.

Exhibit D

APPELLANTS' STATEMENT TO THE PRESS

We have decided to speak to the Press for the following reasons:

1. The gag rule comes after the University, Sacramento, and powerful interests in the State have already prejudiced people against us.

2. We cannot accept the precedent of a gag rule against the defense in political trials where it would be especially prejudicial because the prosecution always attempts to hide political activities behind legal language.

3. We were arrested as scapegoats in a constitutionally protected political demonstration—arrested not because of what we did that day, but because we have all been active in effective movements against the war, University autocracy, and racism.

The reason for this press conference is that we are making an attempt to insure ourselves a fair and public trial. A recent ruling by the Supreme Court reversed the conviction of Sam Sheppard on the basis that pre-trial publicity on the part of the prosecution made it impossible for Sheppard to get a fair trial. It was felt that the jury had to be prejudiced against Sheppard.

Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pre-trial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his

ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. We have been publicly branded a small group of outside agitators who planned in advance and then provoked the events which culminated in the student strike. If this is the only view that the public is allowed to hear, how could a jury help but be prejudiced? We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible.

Nobody planned in advance the sit-in that occurred. The University had in the past permitted picketing of military tables. How could we have known that they would tear up picket signs this time? How could we have known that, when a football player would strike a protestor, the University police would arrest the person struck and not the assailant? It was events such as these that provoked the sit-in, by their nature, they could not be planned in advance.

As to the sit-in itself, some of those arrested did play a leading role in it. However, some played no role. There were also many students in leadership positions. None of these were arrested. The reason we were singled out is that we have in the past participated in activities on the Campus that the University disapproved of and found embarrassing, such as Viet-

nam Day, and Black Power Day. This is, then, clearly a case of political persecution.

As to our rights to be active politically on the Campus, we feel that these are fully protected by the Constitution. The right of free political expression and association are supposed to be the inalienable rights of all citizens. When we enter the Campus of the University of California, we do not surrender our citizenship. It is therefore unconstitutional to demand that we surrender our political rights. Some of the most significant political events in the country have occurred at the University of California. We believe we have not only a legal right but also a moral duty to participate in them.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 464

STEVEN HAMILTON, MICHAEL SMITH, STEWART ALPERT, and JERRY RUBIN,
Petitioners,

vs.

THE MUNICIPAL COURT FOR THE BERKELEY-ALBANY JUDICIAL DISTRICT,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, is reported in 270 A.C.A. 885 (1969). This opinion is appended as Exhibit "A" to the Petition for Writ of Certiorari.

On May 14, 1969, the California Supreme Court denied petitioner's application for a hearing without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether in discharging the duty to insure a fair trial imposed by *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a trial judge may, constitutionally, issue a pretrial publicity order directing the accused and accuser alike to refrain from making public statements concerning issues likely to arise at trial within the month preceding trial?

2. Whether the state appellate court applied the "clear and present danger" test in concluding that the trial court's pretrial publicity order was necessary to safeguard the parties' rights to a fair trial by an impartial jury?

3. Whether the trial court's pretrial publicity order was unconstitutionally vague and overbroad?

STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution.

California Penal Code section 166(4):

> "Every person guilty of any contempt of Court, of either of the following kinds, is guilty of a misdemeanor:
>
> ". . . .

"4. Willful disobedience of any process or order lawfully issued by any Court;"

STATEMENT

By a complaint filed on November 30, 1966, in the Municipal Court for the Berkeley-Albany Judicial District, petitioners were accused of violating Penal Code section 372, committing a public nuisance, and section 602(1), unlawful occupation of real property or structures (CT 24). These misdemeanor charges grew out of a much publicized demonstration on the campus of the University of California at Berkeley, protesting the presence of recruiters for the armed services of the United States.

A pretrial hearing was held on December 16, 1966. In order to secure a fair trial for all parties, and after discussion with the prosecutor and defense counsel, in petitioners' presence, the court entered its order, providing in pertinent part as follows:

"Pretrial Publicity

"To assure a fair trial in this case it is essential to keep pre-trial publicity to an absolute minimum. Therefore, and in accordance with the discussion between the court and counsel in the presence of the defendants in open court this day,

"A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and coun-

sel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy.

"B. This order shall apply *inter alia* to the parties and their counsel, to all law enforcement agencies, to the regents of the University of California and their agents and employees, and to the Associated Students of the University of California, their members and affiliated organizations.

"The Court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The Court will entertain motions for any further orders that may be necessary or desirable in this matter." (CT 28).

Trial was set for Monday, January 16, 1967 (CT 37). On the preceding Friday, January 13, in front of the Berkeley-Albany Courthouse, where their trial was to take place, petitioners held a press conference. They issued "FOR IMMEDIATE RELEASE" this statement:

"We have decided to speak to the Press for the following reasons:

"1. The gag rule comes after the University, Sacramento, and powerful interests in the State have prejudiced people against us.

"2. We cannot accept the precedent of a gag rule against the defense in political trials where it would be especially prejudicial because the

prosecution always attempts to hide political activities behind legal language.

"3. We were arrested as scapegoats in a constitutionally protected political demonstration—arrested not because of what we did that day, but because we have all been active in effective movements against the war, University autocracy, and racism.

"The reason for this press conference is that we are making an attempt to ensure ourselves a fair and public trial. A recent ruling by the Supreme Court reversed the conviction of Sam Sheppard on the basis that pre-trial publicity on the part of the prosecution made it impossible for Sheppard to get a fair trial. It was felt that the jury had to be prejudiced against Sheppard.

"Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pre-trial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. We have been publicly branded a small group of outside agitators who planned in advance and then provoked the events which culminated in the student strike. If this is the only view that the public is allowed to hear, how could a jury help but be prejudiced? We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible.

"Nobody planned in advance the sit-in that occurred. The University had in the past permitted picketing of military tables. How could we have known that they would tear up picket signs this time? How could we have known that, when a football player would strike a protestor, the University police would arrest the person struck and not the assailant? It was events such as these that provoked the sit-in, by their nature, they could not be planned in advance.

"As to the sit-in itself, some of those arrested did play a leading role in it. However, some played no role. There were also many students in leadership positions. None of these were arrested. The reason we were singled out is that we have in the past participated in activities on the Campus that the University disapproved of and found embarrassing, such as Vietnam Day and Black Power Day. This is, then, clearly a case of political persecution.

"As to our rights to be active politically on the Campus, we feel that these are fully protected by the Constitution. The right of free political expression and association are supposed to be the inalienable rights of all citizens. When we enter the Campus of the University of California, we do not surrender our citizenship. It is therefore unconstitutional to demand that we surrender our political rights. Some of the most significant political events in the country have occurred at the University of California. We believe we have not only a legal right but also a moral duty to participate in them." (CT 25-26; Petitioners' Exhibit D).

On the day petitioners held their press conference, they were charged with statutory criminal contempt, in violation of Penal Code section 166(4) (CT 27). That section makes "willful disobedience of any process or order lawfully issued by any Court" a misdemeanor.

On January 16, 1967, petitioners were tried and convicted on the original charges.

On March 1, 1967, petitioners demurred to the contempt complaint (CT 30). Their demurrer was overruled on March 27, 1967 (CT 34). Petitioners next applied to the Superior Court of Alameda County for an alternative writ of prohibition staying their trial for contempt (CT 1-5). The alternative writ was issued on June 19, 1967 (CT 17-18). The matter came on for hearing and on August 25, 1967, final judgment was entered denying the petition for a peremptory writ of prohibition, the alternative writ being discharged (CT 42-43).

On March 20, 1969, the Court of Appeal of the State of California, First Appellate District, Division Three, affirmed the judgment of the Superior Court. Petitioners' Exhibit A. On May 14, 1969, the California Supreme Court denied petitioners' application for a hearing without opinion. Petitioners' Exhibit B. A petition for a writ of certiorari was filed in this Court on August 12, 1969.

ARGUMENT

Petitioners urge this Court to disapprove the pretrial publicity order issued below on the ground that it unduly restricted their constitutional right to discuss publicly the political and social implications of their participation in a civil disturbance giving rise to criminal charges against them. Petitioners apparently would have the Court believe that they violated the order so as to enlighten the public on pressing social issues and to vindicate their First Amendment rights.

We perceive an altogether different purpose. When, virtually on the eve of trial, petitioners deliberately defied the trial court's injunction, they made their purpose clear:

> "1. The gag rule comes after the University, Sacramento, and powerful interests in the State have already prejudiced people against us.
>
> ". . . .
>
> "The reason for this press conference is that we are making an attempt to insure ourselves a fair and public trial. . . .
>
> ". . . The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. . . ; We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible." Petitioners' Exhibit D, xv-xvi.

Petitioners were equally candid in their appeal to the state court:

> "[A]ppellants' statement constitutes an attempt to redress what appellants believe to be an imbalance in the press coverage of the events at the university." Appellants' Opening Brief in Court of Appeal, 14.

Petitioners now justify their "brazenly flagrant flouting of an order obviously made for their own protection"[1] by arguments which debilitate *Sheppard v. Maxwell, supra.* Until *Sheppard,* this Court struggled vainly to resolve the apparent conflict between the rights of fair trial and free expression. *Bridges v. California,* 314 U.S. 252 (1941); *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Craig v. Harney,* 331 U.S. 367 (1947); *Maryland v. Baltimore Radio Show,* 338 U.S. 912 (1950); *Wood v. Georgia,* 370 U.S. 375 (1962). By applying the "clear and present danger" test in *Bridges, Pennekamp,* and *Craig,* the Court effectively removed contempt as a means of controlling the communications media. It was generally believed that those decisions brought into irreconcilable conflict the guarantees of the First and Sixth Amendments, free speech and free press and fair trial.

Sheppard brought a new approach and a new hope: preservation of both free press and fair trial by specific limited judicial restrictions upon speech. The Court showed that the free press-fair trial dilemma

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[1]Petitioners' Exhibit A, ix.

is not an unavoidable conflict to be resolved only by preferring one right to the other; it is a potential conflict avoidable by application of procedural devices, including pretrial publicity orders. In effect, the Court acted to interrupt temporarily the media's sources of prejudicial information, impliedly finding a constitutional difference between broadly silencing the press through the unfocused threat of contempt and carefully limiting its information sources.

We urge this Court not to retreat from *Sheppard*, but to entrust to the judiciary, the traditional guardian of First Amendment liberties, the task of securing a fair trial to accused and accuser by issuing pretrial publicity orders when it appears that the Sixth Amendment right otherwise might be lost. Some, mindful of *Bridges* and its progeny, doubt that *Sheppard* means what it says.[2] Denial of the instant petition would bolster their confidence in *Sheppard*.

I

THE TRIAL COURT ISSUED ITS ORDER UPON A CLEAR AND PRESENT DANGER THAT PRETRIAL PUBLICITY WOULD PREVENT A FAIR TRIAL BY AN IMPARTIAL JURY.

Petitioners first contend that the pretrial publicity order constitutes a prior restraint on speech made by the trial court without regard for the "clear and present danger" test. Petition, 14. This error, they argue, was compounded in the appellate court, which emasculated the Holmes-Brandeis formula by find-

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[2]See, *e.g.*, Petitioners' Exhibit A, ix.

ing it satisfied by "the mere existence of public controversy or publicity concerning the criminally accused and their conduct." Petition, 18, 30.

We disagree. Petitioners lodged with the appellate court some 87 newspaper articles concerning the petitioners, their impending trial, and the events giving rise to the charges against them. In this material, the appellate court found evidence adequate to support the implied finding of the trial court that continued pretrial publicity posed a "clear and present danger" to a fair trial.

> "[T]he evil the trial court sought to prevent by its order was the denial of a fair trial to all parties by harmful and prejudicial publicity generated by those involved in the proceedings then before the court. The imminence of the danger which the court sought to foreclose is clear." *Hamilton v. Municipal Court, supra,* 889.

Indeed, the appellate court applied the "clear and present danger" standard notwithstanding our opposition. Given the procedural safeguards built into a criminal trial, particularly the opportunity to *voir dire* prospective jurors, we emphasized that an accused or his accuser rarely could demonstrate that prejudicial publicity *immediately imperiled* a fair trial. *Cf. Craig v. Harney,* 331 U.S. 367 (1947). One seeking the protection of a judicial order would be forced to wait until the anticipated injury was inflicted. See *Crosswhite v. Municipal Court,* 260 Cal.App.2d 428 (1968). If *actual* prejudice remained the standard for reversal in prejudicial publicity cases, the "clear

and present danger" test, as customarily verbalized, would be perfectly workable. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), however, this Court rejected actual prejudice as the exclusive test. An accused now need show only *inherent* prejudice. That is, given massive, pervasive and prejudicial publicity, partiality will be presumed despite juror's claims of fair-mindedness. *Sheppard v. Maxwell, supra.* The standard of reversal in publicity cases is now far more sensitive than is the "clear and present danger" test. To protect defendants against wrongful conviction, and to safeguard the people's one and only opportunity for a fair trial, the standard for protection against prejudicial publicity, we reasoned, should be made to conform with the standard for reversal. A pretrial publicity order would be proper if the trial court reasonably concluded that there otherwise existed a *substantial likelihood* that pretrial publicity would interfere with the separate rights of accused and accuser to a fair trial by an impartial jury.

We pointed out that none of this Court's decisions applying the "clear and present danger" test in contempt cases involved a jury trial. "[T]he limitations on free speech assume a different proportion when expression is directed toward a trial. . . ." *Wood v. Georgia, supra,* 390. *Bridges, Pennekamp,* and *Craig* did not involve a statutory contempt or willful disobedience of a judicial order. Each of those cases did involve the "unfocused threat" of the contempt power, *Bridges v. California, supra,* 269, applicable not only to the parties but to the press. By way of

contrast, this case involves a narrowly restricted threat of contempt, limited to the parties and excluding the press. Further, those to whom the order is directed are not made to guess at what is forbidden; they are told what is temporarily prohibited. We objected that the "clear and present danger" test imposed a tyranny of labels. Words—"clear," "present," "immediate," "peril,"—cannot substitute for a weighing of competing interests. Our position was well articulated in *Pennekamp v. Florida, supra,* at 336:

> "Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."

Our view gained the approval of the United States Court of Appeals for the Tenth Circuit, in *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969),[3] decided after *Hamilton*. In affirming a contempt conviction for violation of a pretrial publicity order by criminal defendants, the Court of Appeals rejected the contention that such an order could be entered only if pretrial publicity posed a "clear and present danger" to a fair trial.

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[3]Petition for Writ of Certiorari filed on August 11, 1969. 38 U.S.L.W. 3078.

> "The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices." 412 F.2d at 666.

The California Court of Appeal, however, adhered to the "clear and present danger" standard as formulated in *Bridges v. California, supra,* at 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Hamilton v. Municipal Court, supra,* at 889.

The substantive evil which the trial court sought to prevent was extremely serious. The People have no recourse from an unfair trial by a prejudiced and partial jury. An accused has but one: reversal and retrial. "[R]eversals are but palliatives . . . ," however, "the cure lies in those remedial measures that will prevent the prejudice at its inception." *Sheppard v. Maxwell, supra,* at 363. Mr. Justice Jackson, dissenting in *Craig v. Harney, supra,* at 394-95, observed that:

> "The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a prejudicial hearing as dispassionate and impartial as the weakness inherent in men will permit."

The probability that several of the enjoined parties would issue statements containing prejudicial material was high; the probability that petitioners would attempt to influence community opinion approached certainty. On December 14, 1966, the Berkeley Daily Gazette reported that upon entering not guilty pleas the day before, petitioners distributed a mimeographed statement which declared:

> "[T]he university is making us scapegoats. Our arrest is a political arrest; this will be a political trial.
>
> "There were students who were leaders in the demonstration who were not arrested, and some non-students arrested who were clearly not in the leadership of the action.
>
> "The six of us arrested have one thing in common—we are all non-students and we have been previously active in political events that have been embarrassing to the administration."[4]

The trial court's judgment that, if left unrestrained, petitioners again would attempt to prejudice the community in their favor was vindicated by the statement issued in violation of the order. In a sensational case featuring nationally known defendants represented by equally prominent counsel, where a party has made earlier efforts to mold public opinion, continued efforts may well succeed. The Court of Appeal correctly concluded that "[t]he imminence of the danger which the [trial] court sought to foreclose is clear." *Hamilton v. Municipal Court, supra,* at 889.

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[4]The quoted material appears in a newspaper article which petitioners lodged in the Court of Appeal.

The trial court's response was an order carefully tailored to meet the exigent circumstances. Petitioners' freedom of speech was restricted in a limited and temporary manner. The order was effective only from December 16 until trial, scheduled for January 17. Petitioners were restrained from speaking to the public only as to matters covered by the order. The trial court issued its order in petitioners' presence, and invited the parties to seek a clarification or modification as necessary.

Contrary to their assertion, petitioners were not "gagged" by the pretrial decree. If they sincerely believed they were victims of political persecution, petitioners could have effectively aired their grievance by seeking a writ of prohibition in the state courts or by filing a civil rights suit in the federal courts. Either legal action would guarantee publicity sufficient to satisfy even petitioners.

We have so far justified the court's order as a constitutional accommodation between the People's right to a fair trial and the petitioners' right to speak their minds. The Supreme Court of New Jersey, in *State v. Kavanaugh*, 243 A.2d 225, 231 (1968), identified another compelling interest: the public interest in the integrity of the judicial process. *Cf. United States v. Tijerina, supra,* at 666. When, on the eve of trial, a party resorts to the forum provided by the news media, he impugns the integrity of the judicial process. If pretrial restraints are placed upon the prosecution, as *Sheppard* mandates, but voluble defendants are left free to hold press conferences de-

nouncing the motives of the prosecution, the prosecution's evidence and witnesses, or commenting upon the merits of the case, the public will immediately perceive unfairness. Whether that unfairness is more apparent than real matters little. The trial court, having stilled the accuser but not the accused, will no longer be regarded as an impartial tribunal.

II

THE TRIAL COURT'S DUTY TO INSURE A FAIR TRIAL FOR ALL PARTIES COMPELLED IT TO ISSUE A PRETRIAL PUBLICITY ORDER AUTHORIZED BY SHEPPARD v. MAXWELL.

Petitioners denounced the trial court's order as a dangerous precedent for silencing government's critics by accusing them of crimes. Conceding that some judicial control may be exerted over defendants awaiting trial (Petition, 36), petitioners maintain that the trial court exceeded the mandate of *Sheppard.*

The State has a right to a fair trial. *State v. Kavanaugh, supra,* at 231. An accused may be enjoined from disseminating before trial information which by its prejudicial nature jeopardizes the public right to a fair trial. *United States v. Tijerina, supra,* at 666. "[J]ustice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934). A criminal defendant has no right to prejudice the community in his favor even as the prosecution and its witnesses are stilled. "[T]he system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice

against his prosecution. Between him and the state the scales are to be evenly held.'" *Hayes v. Missouri*, 120 U.S. 68, 70 (1887), quoted in *Swain v. Alabama*, 380 U.S. 202, 220 (1965).[5]

In *Sheppard v. Maxwell* this Court declared:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, *the accused*, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Id.* at 363 (emphasis supplied). See *id.* at 361.

Unlike the accused, the People may not seek a change of venue because of prejudicial publicity; unlike the accused, the People have no remedy in reversal because a defendant has prejudiced but one of twelve jurors. In controversial cases, as here, the public's right to a fair trial must rest upon the efficacy

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[5]That the public is entitled to a fair trial is implicit in decisions recognizing the public's right to a public trial. The latter right, enjoyed by accused and accuser alike, safeguards the independent interests of both in receiving a fair trial. See *Kirstowsky v. Superior Court*, 143 Cal.App.2d 745, 752 (1956); *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *Singer v. United States*, 380 U.S. 24, 35 (1965).

Jeremy Bentham recognized that the interest of the public in open trials is separate from the interest of the parties themselves. The public's right may not be waived even with judicial consent. "The reason is, that . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the persons concerned (the judge included), be made a sacrifice." Bentham, Rationale of Judicial Evidence (1827), vol. 1, pp. 573-77. *Accord*, 4 U.C.L.A. L.Rev. 475, 477 (1956-57). And see *Cox v. State*, 238 A.2d 157, 158 (Md. 1968).

of a judicial order made effective by the sanction of contempt. No order could be effective if a defendant is left free to prejudice prospective jurors under the guise of redressing an asserted imbalance of information. A criminal defendant has other adequate protection against partial jurors including voir dire examination, change of venue, continuance, mistrial, and reversal on appeal.

The Supreme Court of New Jersey recently said of the Canons of Professional Ethics:

> "The ban on statements by the prosecutor and his aids applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence."

State v. Van Duyne, 204 A.2d 841, 852 (New Jersey 1964). The Canons of Ethics do not apply to defendants personally, but the principle recognized in *Van Duyne* does.

Petitioners urge that fundamental fairness demands that they be permitted publicly to defend their reputation against criminal charges. They were afforded this opportunity when in open court they pleaded not guilty. The pretrial order expressly permits them to publicize their plea. Petitioners further had the opportunity to vindicate themselves at trial. To the extent that they conflict, the accused's interest in protecting his reputation in a manner and at a time of his own choosing must accede to the public's interest in a fair trial. Otherwise, criminal defendants could and

would, without fear of rebuttal, attack the reputation of their victims in the sensitive pretrial period.

Petitioners further contend that the order issued by the trial court prevented them from expressing publicly their opinion on the grievances underlying the demonstration on the Berkeley campus which led to the filing of the original charges against them. This contention is utterly without merit; the order does not limit such discussion. On December 17, 1966, the Berkeley Daily Gazette reported that Judge Brunn, who issued the order, said that it was not designed to halt debate on the campus. Petitioners lodged this news report with the state appellate court.

Petitioners contend that a pretrial publicity order may not be issued absent "direct proof that specified information would have a prejudicial effect on the trial if released." Then, they concede, an order limited to the material so specified could be issued if the harm could not be prevented by alternative means. Any other interpretation of *Sheppard*, they reason, would assume the overruling of *Bridges* and its progeny. Petition, 24.

Petitioners profoundly misunderstand the thrust of *Sheppard*. We have shown at the outset that *Sheppard* takes a new direction. Standards enunciated in *Bridges* for controlling the press are not the standards applicable under *Sheppard* for controlling sources of information. Contrary to petitioners' suggestion, in cases like this there are no adequate alternatives to pretrial orders. And, contrary to petitioners' view, *Sheppard* does not require direct proof that

specified information would be prejudicial if released. To do so would prevent a court from entering any effective prophylactic order and would require it throughout the pretrial period to act as censor. Trial participants will not always trouble themselves to clear each statement they wish to make with the court; nor should the court be troubled with each statement contemplated by the participants.

Petitioners fear that countless injustices must flow from an ungrudging construction of *Sheppard*. They express concern that similar orders will, by restricting the right of reply, damage defendants' reputation and thereby impair their ability to earn a living. Petition, 25. Petitioners themselves claim no such injury. This order, the *only* order before this Court, permitted petitioners to publicize their pleas. In addition, petitioners were left free to state that they could not then say more because of the pending court order. Indeed, petitioners protected their reputations by explaining their conduct to the press just three days before the trial court issued its order.

It is urged that if pretrial orders are permissible, government will silence its critics by commencing criminal proceedings against them. Petition, 25. First, *this order* had no such effect. Petitioners remained free to discuss publicly circumstances underlying University disturbances. Newspaper articles lodged by petitioners in the appellate court attest to continued public discussion of that subject. Second, federal courts provide a remedy when the State prosecutes in bad faith. See *Dombrowski v. Pfister*, 380 U.S. 479

(1965). Third, pretrial orders are entered by judges, not by prosecutors or public office holders. We are confident that the independent judiciary of this State will remain untainted by the corruption and villainy petitioners would attribute to the executive branch.

III

THE ORDER IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioners contend that the Municipal Court's order is void for vagueness, that it denies procedural due process by failing to supply adequate notice of the limitations placed upon their activities. Petition, 32. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *Cf. Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). However, " 'it is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited.' " *Kelly v. Mahoney*, 185 Cal.App.2d 799, 803-04 (1960). *Cf. Nash v. United States*, 229 U.S. 373, 377 (1913).

Petitioners claim to be confounded by several provisions in the pretrial order. The order commanded that "the parties shall not, directly or indirectly,

release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants."

Petitioners profess to be perplexed by the meaning of "directly or indirectly." Petition, 33. *Cf. United States v. Tijerina, supra,* at 663 n. 1. Uncommon understanding is not necessary to comprehend that "directly" means "personally," and that "indirectly" means "through other persons." Petitioners could speak out privately, but *not to others* for the purpose of republication in the press. "Information or opinion concerning the trial or any issue likely to be involved therein" encompasses discussion of legal or factual defenses. It does not forbid statements that important constitutional questions are at issue; it does restrain petitioners from arguing those defenses in the press. Similarly, the restriction on public discussion of "the merits of the complaint" restrains discussion of defenses, the quality or quantity of evidence for or against guilt, whether the complaint is based upon probable cause,[6] or the identity and credibility of witnesses. *Compare Sheppard v. Maxwell, supra,* at 361, concerning "statements concerning the merits of the case," *with United States v. Tijerina, supra,* at 663 n. 1 and 667. The prohibition against statements pertaining to "trial tactics or strategy," and "arguments" no doubt was addressed particularly to opposing coun-

[6]This could be tested by a motion pursuant to Penal Code section 995.

sel. We submit, however, that petitioners would have no less difficulty determining whether they were speaking on these subjects than would counsel. The quoted words are not terms of art.

We note that petitioners' understanding of the terms of the order must have benefitted from the discussion in the trial court recited in the order. If they were uncertain as to the scope of the order, petitioners could have requested clarification then or, as suggested in the order, at a later date. Their failure to do so confirms that the order was not vague.

The claim of vagueness is somewhat surprising. Petitioners' press release, issued in defiance of the trial court's order, proclaims:

> "We cannot accept the precedent of a gag rule. . . .
>
> "The reasons for this press conference is that we are making an attempt to insure ourselves a fair and public trial. . . .
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> "Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pretrial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. . . . We must speak to the press. We must give the people of the State of California our view of the events."

On the eve of trial, the contemners violated the order not because they did not understand it, but because they did not like it. Their contempt was deliberate. They cannot now seek refuge in the void-for-

vagueness doctrine. "A claim of guilelessness ill becomes those with evil intent." *Dennis v. United States,* 341 U.S. 494, 515 (1951).

This Court has invoked the traditional rule of standing when a statute is attacked as void on its face. *Screws v. United States,* 325 U.S. 91 (1945); *Williams v. United States,* 341 U.S. 97 (1951); *Dennis v. United States, supra.* See Amsterdam, *Void-For-Vagueness Doctrine in the Supreme Court,* 109 U.Pa. L.Rev. 67, 96 (1960). A finding of no standing means that the challenged statute supplied adequate notice under the circumstances to the present parties and, therefore, is not vague as to all persons. Whether the statute imparts sufficient notice to any other person is a question left for a later day, although as to others the claim of vagueness appears well taken. See *Dennis v. United States, supra,* at 515-16.

Where a vagueness attack is mounted against a judicial order directed to named persons rather than against a statute addressed to the general public, strict application of the standing requirement is especially appropriate. One who intentionally defies a judicial order will not be heard to complain that the order was poorly drafted.

We recognize that the standing requirement generally is held in abeyance when the statute attacked inhibits free speech. See *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940); *Dombrowski v. Pfister,* 380 U.S. 479 (1965). But this Court has applied the standing rule where a statute regulating the content of speech was challenged.

Petitioners in *Dennis v. United States, supra,* urged that the Smith Act was so unconstitutionally uncertain as to inhibit free speech. In affirming the judgment below this Court said:

> "We agreed that the standards as defined is not a neat, mathematical formulary. Like all verbalizations, it is subject to criticism on the score of indefiniteness. . . . But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute." *Id.* at 515-16.

Where, despite a defendant's having adequate notice, courts have declined to apply the standing requirement to vagueness attacks upon statutes narrowing freedom of expression, they have done so out of a reluctance to leave standing any law which may inhibit others in the exercise of their First Amendment freedoms. However, where the attack is upon a judicial order limited in time and limited to named parties, invoking the traditional standing requirement leaves on the books no law which chills speech throughout the community.

The method of petitioners' vagueness attack is familiar: by torturing otherwise clear language unsuspected meanings are uncovered. These hidden meanings then are offered as proof of vagueness. The standard of constitutional certainty is, however, common understanding, not uncommon ingenuity. The trial court's order is not unconstitutionally vague.

IV

THE PRETRIAL PUBLICITY ORDER IS NOT UNCONSTITUTIONALLY OVERBROAD.

Petitioners complain that the order is unconstitutionally overbroad, that it "bars comments by the defendants on almost the entire range of controversial university issues surrounding their arrest and prosecution. . . ." Petition, 29. Petitioners further criticize the order on the ground that it extends to persons whose conduct could not be regulated by the trial court.

The Court of Appeal pointed out that the order "does not prohibit the defendants from describing the charges against them and unequivocally asserting their own innocence. It does prohibit discussion of the merits of the case and the evidence and arguments that might be presented at trial, and in this respect goes no further than the permissible limits noted in *Sheppard.*" *Hamilton v. Municipal Court, supra,* at 890.

The pretrial order does not specifically prohibit discussion of the controversial issues underlying campus disturbances. The order limited comment on matters to be placed before a jury. Petitioners were free to criticize police, University officials, and others to the extent that they did not thereby publicly rehearse their trial defense. The order did not limit debate on controversial campus issues. The judge who issued the order said as much in the local press the day after the order was entered. This press report certainly did not escape petitioners' notice. Petitioners never-

theless insist that the order is so vague as to be fairly subject to that interpretation. For the reasons stated above, their vagueness attack must fail.

The pretrial order did restrain petitioners from publicly denouncing their prosecution as a political persecution. Such a statement during the pretrial period would have been highly inflammatory. The trial court's order did not completely silence petitioners on this matter, however. Three days before the order issued appellants distributed to the press a statement declaring "the University is making us scapegoats. Our arrest is a political arrest; this will be a political trial." Had they believed their own publicity releases petitioners could have sought redress in the state courts by writ of prohibition or in the federal courts under the Civil Rights Act. In light of petitioners' prior statements and available remedies, the order, while ostensibly regulating content, effectively regulated only the time, place, and manner of speech. Under the surrounding circumstances that restriction was reasonable and constitutional.

Lastly, it is argued that the overbreadth of the order is reflected in its scope. The order was directed, *inter alia,* to University regents, employees, and agents, and to the membership of the Associated Students of the University of California. Representatives from these groups had spoken out on the charges against petitioners. Had this publicity continued, the parties' opportunity for a fair trial would have been impaired. While not party to the proceedings, the above were party to the conduct which was the basis

for the criminal charges against petitioners. The Court of Appeal correctly concluded that the order properly extended to all named persons.

Assuming *arguendo* that it did not, however, the order nevertheless remained valid as to appellants. This its because the alleged invalid portion of the order is severable. Severance is easily accomplished where all parties are named. The reviewing court need not rewrite the order, but only delete those not proper parties. Severance is particularly appropriate here, for petitioners made clear that they spoke to the press not to vindicate the rights of others but to prejudice prospective jurors in their favor.

A pretrial publicity order is an *ad hoc* response to a specific situation. No two such situations are identical. We may therefore be certain, despite petitioners' claimed fears, that the order before this Court cannot serve as a precedent for overly broad orders in future cases.

CONCLUSION

For the stated reasons we respectfully urge this Court to deny the Petition for a Writ of Certiorari.

Dated, November 25, 1969.

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